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No. 83-1034

In the Supreme Court of the United States

OCTOBER TERM, 1983

GUY BRAIN, et al.,
Petitioners

v.

ROADWAY EXPRESS, INC., et al.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF ROADWAY EXPRESS, INC. IN OPPOSITION

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The Respondent, Roadway Express, Inc., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's opinion in this case.

QUESTIONS PRESENTED

1. Whether this Court's decision in Del Costello v. International Brotherhood of Teamsters, ___ U. S. ___, 103 S. Ct. 2281, 76 L Ed. 2d 476 (1983) is an exception to the general rule that decisions shall be granted retroactive effect.

2. Whether the statute of limitations for bringing an action under 29 U.S.C. §185 (§301 of the Labor Management Relations Act) should be tolled while plaintiffs attempt to exhaust internal union remedies even though under the law in their Circuit such was not a necessary prerequisite to instituting the action.

3. Whether the resolution of labor grievances through the parties' agreed-to dispute resolution mechanism commences the running of the statute of limitations in actions brought under 29 U.S.C. §185 (§301 of the Labor Management Relations Act).

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STATEMENT OF THE CASE

The Respondent, Roadway Express, Inc. (hereinafter sometimes referred to as "Roadway") substantially agrees with the facts as set forth in the Petitioners' Statement of the Case. (Pages 1 through 5 Petition) However, certain facts relevant to a determination of whether a writ should issue were omitted by the Petitioners and, therefore, require mentioning. (Rule 34.2, Rules of the Supreme Court)

Initially, it should be noted that the grievance dispositions which the Petitioners are attempting to challenge through these proceedings were obtained through the parties' collectively bargained dispute resolution mechanism. The Petitioners' first grievances, filed in May, 1978, were withdrawn on September 14, 1978 by the Petitioners' Union (Local

407 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America - hereinafter sometimes referred to as the "Union") just prior to hearing at the fourth step of the grievance procedure. These grievances were withdrawn since a settlement had been reached between the Union and Roadway. The Petitioners' then filed a second set of grievances which were decided in favor of Roadway on July 19, 1979 by a unanimous decision of the Joint State Committee.

The Petitioners thereafter filed internal union charges against specific Union officials alleging breaches of the duty of fair representation owed to the Petitioners. Subsequently, on December 18, 1980, the Petitioners commenced the within action by filing their Complaint. This was prior to a final decision on

their internal union charges which was not announced until February 14, 1981.

SUMMARY OF ARGUMENT

The Petition for a writ of certiorari should not be granted since this case does not present those special and important reasons which warrant the attention of this Court. The Petitioners have failed to set forth any question of federal law which is of such paramount significance that such issue should be settled by this Court.

Moreover, as more fully discussed infra, the Courts of Appeal are in agreement as to the retroactive application of this Court's decision in Del Costello v. International Brotherhood of Teamsters, ___ U. S. ___, 103 S. Ct. 2281, 76 L Ed. 2d 476 (1983) as five Circuits have already so held. Although at first blush it would appear that the Ninth Circuit,

as well as the court below in another case, may have held to the contrary, a close examination of these two cases reveals that they are factually and logically distinguishable, and therefore a conflict does not exist among the Circuits.

ARGUMENT

REASONS WHY THE WRIT SHOULD BE DENIED

A. The Circuit Courts Of Appeal Are Unanimous, With Explainable Exceptions, In Applying The Rule Of Del Costello Retroactively.

While the case at bar was pending before the Sixth Circuit Court of Appeals, this Court rendered its decision in Del Costello v. International Brotherhood of Teamsters, ___ U. S. ___, 103 S. Ct. 2281, 76 L Ed. 2d 476 (1983) holding that the statute of limitations

to be applied to actions such as this is the six-month limitation period of Section 10(b) of the National Labor Relations Act (29 U.S.C. §160(b)). Del Costello, supra, 103 S. Ct. at p. 2287. The Sixth Circuit then applied Del Costello, and affirmed the District Court's dismissal of the Petitioners' action since the complaint had not been filed until at least 17 months after the cause of action had accrued.[1] The Petitioners assert herein that the retroactive application of Del Costello to their pending action is in conflict with a previous decision rendered by the same court, LaBond v. McClean Trucking

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1. Pages 10 - 11 of the Order of the Sixth Circuit, Appendix A to the Petition.

Company, No. 82-1576, unreported (1983),[2] and the decision of the Ninth Circuit in Edwards v. Teamsters Local 36, 719 F.2d 1036, (9th Cir. 1983) which, therefore, mandates that their Petition be granted.[3]

However, contrary to the assertion of the Petitioners, a conflict does not exist among the Circuit Courts, but rather, those which have had an opportunity to pass on the issue, have unanimously applied Del Costello to the

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2. Appendix D to the Petition

3. The apparent conflict within the Sixth Circuit, although explainable, in and of itself does not justify the issuance of the requested writ, but rather should be left for the Sixth Circuit to resolve. See, Davis v. United States, 417 U.S. 333, 340 (1974).

parties before them as the Sixth Circuit did herein.[4] Besides the decision of the Sixth Circuit challenged herein, the Third, Fifth, Seventh and Eleventh Circuits have all retroactively applied Del Costello.[5] Therefore, in light of the unanimity of the Circuits, it would be improvident to grant the requested writ.

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4. LaBond, supra and Edwards, supra, although not applying Del Costello retroactively, are distinguishable as discussed infra.

5. Perez v. Dana Corp., 718 F.2d 581 (3rd Cir. 1983), Edwards v. Sea-Land Service, Inc., ___ F.2d ___, (5th Cir. 1983) slip opinion attached as Appendix 1, Storck v. International Brotherhood of Teamsters, 712 F.2d 1194 (7th Cir. 1983), and Rogers v. Lockheed-Georgia Co., ___ F.2d ___ (11th Cir. 1983) slip opinion attached as Appendix 2.

Although in two decisions Del Costello was not applied retroactively, i.e., Edwards v. Teamsters Local 36, supra, and LaBond v. McClean Trucking, Inc., supra, these cases do not conflict with the decisions applying Del Costello retroactively since they are factually distinguishable and the different result easily explained. In both cases, the courts had previously held in Section 301 actions commenced in the state in question, that a specific state three-year statute of limitations applied. Edwards, supra, 719 F.2d at p. 1039, LaBond, supra, at p. 2.[6] In Edwards, the Court stated that due to its prior holding that plaintiffs in this particular state would

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6. Reference to Pitts v. Frito-Lay, Inc., 700 F.2d 330 (6th Cir. 1983) more fully discussed infra.

have three years in which to commence their action, it would be inherently unfair to subsequently hold that an already commenced action was untimely by application of the Del Costello six-month limitation period. Edwards, supra, 719 F.2d at p. 1040.

Likewise in LaBond, the Sixth Circuit refused to apply Del Costello retroactively based on its prior holding in Pitts v. Frito-Lay, Inc., 700 F.2d 330 (6th Cir. 1983), LaBond, supra at p. 2[7] where the court had refused to retroactively apply its decision in Badon v. General Motors Corp., 679 F.2d 93 (6th

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7. The Court also referred to its decision in Badon v. General Motors Corp., 679 F.2d 93 (6th Cir. 1982) which predated Del Costello but reached the same result.

Cir. 1982). (Badon predated Del Costello but had likewise adopted the six-month limitation period for Section 301 actions.) Since both Pitts and LaBond were actions arising in Michigan, the Sixth Circuit refused to retroactively apply a six-month limitation period to these Section 301 suits in light of its previous decisions specifically adopting and applying Michigan's three-year statute of limitations to such actions. Pitts, supra, 700 F.2d at p. 332.

In footnote 3 of its Pitts opinion[8] the Sixth Circuit discussed its refusal to retroactively apply the six-month limitation period to the case before it and explained that this was not in conflict with other decisions retroactively

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8. 700 F.2d at p. 333.

applying the statute of limitations. The Court compared its decision therein with its decision in Lawson v. Truck Drivers, Chauffeurs and Helpers, Local Union 100, 698 F.2d 250 (6th Cir. 1983) which had applied United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981) retroactively to a Section 301 cause of action arising in Ohio, a state for which the court had not yet adopted a longer limitation period. The footnote discussion applies equally to the Sixth Circuit's refusal to retroactively apply Del Costello in LaBond in light of its prior holding establishing a three-year limitation period for Section 301 actions arising in Michigan. The footnote rationale likewise highlights the reasons set forth in Edwards, supra, for not applying Del Costello retroactively to the facts before the court therein.

Therefore, it is apparent that there is not a split among the Circuits concerning the retroactive application of Del Costello. To the contrary, the Circuits are unanimous in applying Del Costello retroactively and have refused to do so only in those limited situations where the result would be the barring of a cause of action brought under prior authority of that Circuit clearly setting forth a much longer limitation period for instituting a Section 301 action. Also, it appears that this Court itself, at least sub silentio has determined that Del Costello should be applied retroactively when it reversed the Court of Appeals in No. 81-2408 and held that the

action before it was governed by the six-month limitation period.[9]

Since a conflict does not exist among the Courts of Appeal with respect to the retroactive application of this Court's decision in Del Costello, and absent any other compelling reason, the petition for a writ of certiorari should be denied.

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9. One would have to wonder why the Petitioners herein should be treated any differently than the Plaintiffs in No. 81-2408 of the Del Costello opinion.

Further, it should be noted that this Court has clearly stated when its decisions are to be given only prospective application. See, e.g., Chevron Oil Co. v. Huson, 404 U.S. 97, 105-109 (1971).

B. Tolling Of The Statute Of Limitations Is Not An Issue That Should Be Decided By This Court Based Upon The Facts In This Case.

The Petitioners contend in the second portion of their Petition for writ of certiorari that this Court should grant the writ and apply the doctrine of equitable tolling to preclude the running of the statute of limitations. However, Petitioners have not set forth any reason why this Court should exercise its discretion and issue the writ, but rather, simply set forth the reasons why they feel equitable tolling should be applied to resurrect their cause of action. Therefore, it is respectfully asserted that the Petition should be denied, not only because there are no reasons justifying this Court's consideration of the matter, but also

because even if a writ should issue, this would not be an appropriate case in which to address the issue since the Petitioners by their own actions are precluded from benefiting from the application of the doctrine.

The Petitioners' argument in favor of the application of equitable tolling is simply that at the time of the grievance resolutions which they challenge, the relevant case law required that they exhaust internal union remedies prior to instituting a Section 301 action. A simple review of the dates involved, however, discloses that this argument is without merit, and, therefore, even if the Court would decide to apply equitable tolling to the Section 301 statute of limitations, the Petitioners would not be entitled to the benefit of the doctrine.

The matters of which the Petitioners complain of in their case-in-chief are the September 14, 1978 withdrawal of their grievances and the July 19, 1979 unanimous decision denying their subsequent grievances. The Petitioners first challenged these actions by filing internal union charges on November 15, 1979 and then by instituting the present action on December 18, 1980. The final decision on their internal union charges was thereafter rendered on February 14, 1981.

At the outset, the weakness in Petitioners' argument that they relied on the law as it existed at the time they instituted their internal union remedies is obvious. On October 30, 1979, prior to the Petitioners having filed their internal union grievance, the Sixth Circuit issued its decision in Geddes v.

Chrysler Corp., 608 F.2d 261 (1979) holding that failure to exhaust internal union remedies is not a defense available to an employer in a Section 301 action, Id., at p. 264, and that plaintiffs were not required to exhaust internal union remedies prior to commencing a Section 301 suit against a union if exhaustion would be futile. Id., at p. 265. Thus, at least in the Sixth Circuit, exhaustion clearly was not a prerequisite to the Petitioners' suit at the time they filed their internal union charges, and, therefore, they cannot legitimately claim that such excused the late filing of their complaint.

The Petitioners also contend that it was not clear that exhaustion of internal union remedies was not an absolute prerequiste to bringing an action under Section 301 until this Court's decision

in Clayton v. Automobile Workers, 451 U.S. 679 (1981), and, therefore, they were justified in pursuing such remedies which excuses the last filing of their complaint. This argument likewise fails for the reasons: (a) the Petitioners did not exhaust their internal union remedies prior to commencing their action[10] and (b) the Petitioners instituted their action before Clayton, supra was decided.[11] Thus, it is apparent that

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10. The Petitioners filed their action on December 18, 1980, however, the final decision on their internal union charges was not rendered until February 14, 1981.

11. Clayton was decided on May 26, 1981, however, the Petitioners had filed their action on December 18, 1980.

even if equitable tolling were to apply, these Petitioners could not avail themselves of the doctrine.

In light of the foregoing, it is apparent that there are no compelling reasons for this Court to exercise its discretion and issue a writ of certiorari on the issue of whether equitable tolling should apply to the statute of limitations for bringing actions under Section 301; especially in light of the fact that these Petitioners are not in a position in which they could legitimately avail themselves of the doctrine even if it were available.

C. The Petitioners' Discussion Of The Doctrine Of Arbitrable Finality Does Not Suggest That This Court Should Issue a Writ of Certiorari.

As above, the Petitioners in Subpart III of their argument likewise fail to set forth those special and important reasons mandating that this Court exercise its discretion and issue a writ of certiorari. To the contrary, it appears that through their discussion of the doctrine of arbitrable finality, the Petitioners are attempting to bootstrap before this Court the merits of their cause of action which the courts below have never addressed. Obviously, such is not an appropriate basis for the issuance of a writ of certiorari.

In a nutshell, the Petitioners suggest that the statute of limitations for

Section 301 actions as clarified in Del Costello, should not be applied to their action since; (a) the Union withdrew and/or settled their initial grievances short of arbitration; and (b) because purportedly the wrong dispute resolution committee under the parties' collective bargaining agreement decided their second grievances. These challenges to the disposition of the Petitioners' grievances are in essence challenges to the Union's processing and handling of the Petitioners' grievances rather than arguments concerning when the applicable limitation period for instituting their action should begin to run.

For example, the fact that the Union did not take the Petitioners' first grievances to arbitration, but rather withdrew and/or settled them, is a fundamental Section 301 action. See, Vaca

v. Sipes, 386 U.S. 171, 175-6 (1967). Obviously, to challenge the Union's decision to resolve a grievance in this matter is an assertion that the Union violated its duty of fair representation, the very essence of a Section 301 cause of action. Vaca v. Sipes, supra. Thus, a determination of whether or not the Union's actions were appropriate would resolve the merits of the Petitioners' cause of action against the Union, which is totally irrelevant to the issue of what statute of limitations should be applied to the action.[12]

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12. After all, the statute of limitations issue was unequivocally decided in Del Costello wherein this Court established the limitation period for suits "alleging. . . that the union had breached its duty of fair representation by mishandling the ensuing grievance-and-arbitration proceedings" ___ U.S. ___ at p. 76 L Ed.2d at p. 482, the very cause of action which the Petitioners are asserting.

Similarly, the Petitioners' contention that the wrong joint committee passed upon their second grievances is of no relevance to what statute of limitations should be applied to their Section 301 action. Once again, this is simply a challenge to the final resolution of the dispute and, therefore, involves the merits of the Petitioners' cause of action. It simply begs the question to assert, as the Petitioners have, that a final and binding grievance decision is invalid because of irregularities in the grievance procedures, but at the same time, argue that the limitation period for bringing actions to challenge the arbitration decision is not appli-

cable.[13] Thus, not only does the Petitioners' argument fail in logic and reason, but more importantly, it does not set forth a valid basis for this Court to exercise its discretion and issue the requested writ of certiorari.

Therefore, Roadway respectfully asserts that the Petitioners' discussion of the doctrine of arbitrable finality is merely an effort to obtain this Court's review of the merits of their case-in-chief which neither of the lower courts have passed upon and, therefore, is not a

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13. It should be mentioned that this Court has on several occasions had before it decisions rendered by joint employer-union committees and has given them the same force and effect as an award rendered by an impartial and neutral arbitrator. See, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 557 (1976) and United Parcel Service v. Mitchell, 451 U.S. 56, 58 (1981).

valid reason for the issuance of a writ of certiorari.

CONCLUSION

The Petition for a writ of certiorari should be denied.

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APPENDIX

Norman E. EDWARDS and

Bobby Wayne Mize,

Plaintiffs-Appellants,

v.

SEA-LAND SERVICE, INC., et al.,

Defendants-Appellees.

No. 81-2283.

United States Court of Appeals,
Fifth Circuit.

Dec. 5, 1983.

Appeals from the United States District Court for the Southern District of Texas.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before THORNBERRY, REAVLEY and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

Under section 301 of the Labor-Management Relations Act of 1947

Appendix 1

("LMRA"), 29 U.S.C. §185 (1976),[1] an employee may bring an action charging his employer with breach of a collective bargaining agreement, and his union with violating its duty of fair representation in mishandling the ensuring grievance. Vaca v. Sipes, 386 U.S. 171, 186-87, 87 S.Ct. 903, 914-15, 17 L.Ed.2d 842 (1967); see Hines v. Anchor Motor Freight, 424 U.S. 554, 567, 96 S.Ct. 1048, 1058, 47 L.Ed.2d 231 (1976). Neither section 301

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1. Section 301(a) states:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1976).

nor any other section of the LMRA expressly designates the statute of limitations applicable to such Vaca-Hines actions.

In Del Costello v. International Brotherhood of Teamsters, _____ U.S. ____, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), the Supreme Court held that the six-month statute of limitations provided by section 10(b) of the National Labor Relations Act, 29 U.S.C. §160 (1976), would apply to an employee's suit against an employer and a union under section 301 of the LMRA. The sole issue we must decide is whether DelCostello applies retroactively. We hold that it does and that the suit against Sea-Land Service, Inc. ("Sea-Land") and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 988 (the "Union") must be dismissed.

I. FACTUAL AND PROCEDURAL BACKGROUND.

On December 27, 1978, following serveral years of employment by Sea-Land, Norman E. Edwards and Bobby Wayne Mize (hereinafter collectively "Plaintiffs") received layoff notices pursuant to the terms of the collective bargaining agreement in effect between Sea-Land and the Union. On January 2, 1979, Plaintiffs filed contractual grievance reports protesting their layoff. On January 15, 1979, Sea-Land amended the reasons for its layoff notices. On April 1, 1980, Plaintiffs received notice that, pursuant to the collective bargaining agreement, their claims had been submitted to arbitration and denied. On April 21, 1981, Plaintiffs filed suit in the district court pursuant to section 301 of the LMRA, alleging that Sea-Land violated the collective bargaining agreement by

laying off and ultimately dismissing them and that the Union violated its duty of "fair representation" by its manner of representing them in the contractual arbitration procedure. They also alleged that they were not reinstated because of age discrimination.

The district court dismissed Plaintiffs' claims against Sea-Land and the Union for lack of timeliness. Based on the Supreme Court's ruling in United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 101 S. Ct. 1559, 67 L.Ed.2d 732 (1981), we held that the Plaintiffs' claim against Sea-Land was governed by Texas' four-year "catch all" statute of limitations. Tex. Rev. Civ. Stat. Ann. art. 5529 (Vernon 1956). Edwards v. Sea-Land Service, Inc., 678 F.2d 1276, 1290 (5th Cir. 1982). In the absence of guidance from the Supreme Court on the

applicable statute of limitations as to the fair representation claim, we applied Texas' two-year statute of limitations applicable to tort actions. Tex. Rev. Civ. Stat. Ann. art. 5526 (Vernon 1982). Id. at 1292. Since the Plaintiffs in the present case had brought their collective bargaining/fair representation claims within thirteen months of the injuries complained of, we reversed the district court's dismissal of the suit against Sea-Land and the Union.

Following our decision, the Union petitioned for a writ of certiorari to the Supreme Court. During the pendency of that petition, however, the Supreme Court decided DelCostello v. International Brotherhood of Teamsters, supra. The Supreme Court, ____ U.S. ____, 103 S. Ct. 3104, 77 L.Ed.2d 1360, acted upon the Union's petition for certiorari by

vacating our earlier decision and remanding the case to the panel for reconsideration in light of DelCostello.

II. RETROACTIVITY OF DelCOSTELLO.

As a general rule an appellate court must apply the law in effect at the time it renders its decision. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 486 n. 16, 101 S. Ct. 2870, 2879 n. 16, 69 L.Ed.2d 784 (1981); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801). Plaintiffs' Vaca-Hines suit against their employer and the Union is indistinguishable from the suits involved in DelCostello. Consequently, if DelCostello applies retroactively, section 10(b)'s six-month statute of limitations, rather than any state statute of limitations, applies to bar Plaintiffs' claims.

Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S. Ct. 349, 30 L.Ed.2d 296 (1971), sets forth three factors that we muct consider to determine whether a civil statute of limitations applies retroactively. First, we must decide whether the decision establishes "a new principle of law, either by overruling clear past precedent on which the litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." Chevron, 404 U.S. at 106, 92 S.Ct. at 355. Second, we must look to the prior history of the decision in question, and to its purpose and effect, to ascertain "'whether restrospective operation will further or retard its operation.'" Id. at 106-07, 92 S.Ct. at 355 (quoting Linkletter v. Walker, 381 U.S. 618, 629, 85 S.Ct. 1731, 1738, 14

L.Ed.2d 601 (1965)). Third, we must weigh "the inequitity imposed by retroactive application." Chevron, 404 U.S. at 107, 92 S. Ct. at 355.

A. The Change from Prior Law.

To determine whether DelCostello created a new principle of law by overruling clear past precedent or deciding an issue of first impression, we must compare DelCostello with prior law. If DelCostello wrought "an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one" on which Plaintiffs relied, retroactive application may be inappropriate. Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481, 498, 88 S.Ct. 2224, 2234, 20 L.Ed.2d 1231 (1968).

Prior to DelCostello, the Supreme Court had not determined the statute of limitations applicable to Vaca-Hines actions. In International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), AFL-CIO v. Hoosier Cardinal Corp., 383 U.S. 696, 86 S. Ct. 1107, 16 L.Ed.2d 192 (1966), the Supreme Court considered the limitations period for a different type of section 301 action,[2] and stated "that

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2. Hoosier Cardinal involved an action by a union against an employer for damages caused by the employer's alleged breach of the collective bargaining agreement. The Court noted that "[s]uch an action closely resembles an action for breach of contract cognizable at common law." 383 U.S. at 705 n. 7, 86 S. Ct. at 1113 n. 7. Accordingly, the Court found the action governed by a six-year state limitation on actions based on oral contracts. Id. at 705-07, 86 S. Ct. at 1113-14. Unlike Vaca-Hines actions, such

(Footnote continued on following page)

the timeliness of a §301 suit, such as the present one, is to be determined as a matter of federal law, by reference to the appropriate state statute of limitations." Id. at 704-05, 86 S. Ct. at 1113. However, the Court specifically noted that it was not required to decide "[w]hether other § 301 suits different from the present one might call for the application of other rules of timeliness," and that it indicated "no view whatsoever on that question." Id. at 705 n. 7, 86 S.Ct. at 1113 n. 7.

Prior to the determination in DelCostello that the section 10(b) six-

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(Continuation of Footnote)

"a straightforward breach of contract suit under §301" did not seek to overturn an arbitrator's award or otherwise challenge the private settlement of disputes. DelCostello, 103 S. Ct. at 2291; see Mitchell, 451 U.S. at 63 n. 5, 101 S. Ct. at 1564 n. 5.

month statute of limitations applies to both the contract suit under section 301 and the fair representation claim, the circuits could not agree on whether the same statute of limitations governed both the action against the employer and the action against the union.[3] This circuit

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3. Compare Smart v. Ellis Trucking Co., 580 F.2d 215, 217, 219 (6th Cir. 1978), cert. denied, 440 U.S. 958, 99 S. Ct. 1497, 59 L.Ed.2d 770 (1979); Butler v. Local Union No. 823, Int'l Bd. of Teamsters, 514 F.2d 442, 447-48 (8th Cir. 1975), cert. denied, 423 U.S. 924, 96 S. Ct. 265, 46 L.Ed.2d 249 (1975); Kennedy v. Wheeling-Pittsburg Steel Corp., 81 L.R.R.M. (BNA) 2349, 69 CCH Labor Cases ¶ 12,980 (4th Cir. 1972); and Abrams v. Carrier Corp., 434 F.2d 1234, 1252 (2d Cir. 1970), cert. denied, 401 U.S. 1009, 91 S. Ct. 1253, 28 L.Ed.2d 545 (1971) (applying same limitations period) with Sanderson v. Ford Motor Co., 483 F.2d 102, 114 (5th Cir. 1973); and De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 285-87 (1st Cir.), cert. denied, 400 U.S. 877, 91 S. Ct. 121, 27 L.Ed.2d 115 (1970) (applying

(Footnote continued on following page)

had held that different statutes of limitations applied to the two actions composing hybrid section 301/fair representation claims. See, e.g., Rigby v. Roadway Express, Inc., 680 F.2d 342, 344 (5th Cir. 1982).

From the time Plaintiffs' action arose until they filed suit, there was no

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(Continuation of Footnote)

different limitations periods). The circuits also could not agree whether to characterize the action against the union as a contract claim, see, e.g., Butler, 514 F.2d at 447-48; Kennedy, 81 L.R.R.M. (BNA) at 2349; Abrams, 434 F.2d at 1252-53; as a tort claim, see, e.g., Smart, 580 F.2d at 217 & n. 1; Sanderson, 483 F.2d at 114; De Arroyo, 425 F.2d at 285-87; or as a claim based on a statute, see, e.g., Gray v. International Ass'n of Heat & Frost Insulators, Local No. 51, 416 F.2d 313, 316 (6th Cir. 1969). Similarly, the circuits differed on whether to characterize the suit against the employer as based on tort, see, e.g., Smart, 580 F.2d at 219; written contract, see, e.g., Bulter, 514 F.2d at 446-47 & n. 3; or oral contract, see, e.g., Kennedy, 81 L.R.R.M (BNA) at 2349; see also Abrams, 434 F.2d at 1252-53 (based on contract express or implied).

clear precedent on which Plaintiffs could rely in waiting thirteen months to file their suit against Sea-Land. Texas has not assigned a specific limitation to arbitration actions arising from collective bargaining agreements and, prior to our vacated decision in this case, we had never addressed the question as to which Texas statute of limitations would be applicable to an action against an employer under section 301 of the LMRA. Although the four-year Texas statute of limitations for breach of contract, Tex. Rev. Civ. Stat. Ann. art. 5527 (Vernon 1982), had been applied to a section 301 claim in Hensley v. United Transports, Inc., 346 F. Supp. 1108, 1115 (N.D. Tex. 1972), this decision, from a district court other than that in which Plaintiffs filed suit, hardly constitutes "clear

past precedent" as contemplated by Chevron.

The existence of precedent with regard to the fair representation claim, however, presents a greater problem. Prior to Plaintiffs' layoff, we held in Sanderson v. Ford Motor Co., 483 F.2d 102, 114 (5th Cir. 1973), that an employee's action against a union for fair representation should be governed by the state statute of limitations for tort actions. See also Cox v. C. H. Masland & Sons, Inc., 607 F.2d 138, 143 (5th Cir. 1979). Thus, with regard to the statute of limitations governing fair representation claims, DelCostello overrules past precedent, at least in this circuit.

B. The Purpose of the DelCostello Ruling.

We next examine whether retrospective operation of the Supreme Court's

ruling in DelCostello "will further or retard its operation." Chevron, 404 U.S. at 106-07, 92 S. Ct. at 355. The Supreme Court expressed three purposes underlying the DelCostello rule. First, the Court recognized "the need for uniformity" as one reason for rejecting the borrowing of diverse state statutes of limitations. DelCostello, 103 S. Ct. at 2294 (quoting Mitchell, 451 U.S. at 70, 101, S. Ct. at 1568 (Stewart, J., concurring in the judgment)); see id. at 2289. Second, the Court emphasized that state statutes of limitations for the vacation of arbitration awards, which Mitchell had held applicable, typically provide very short limitations periods, and thus failed "to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights." Id. at 2291. Third, the Court reaffirmed that federal labor law favored

"the relatively rapid final resolution of labor disputes," and rejected the adoption of long limitations periods which would allow grievance and arbitration decisions to be called into question long after the fact. Id. at 2292-93; see Mitchell, 451 U.S. at 63-64, 101 S. Ct. at 1564-1565. The Court concluded that the six-month limitations period of section 10(b) was best attuned to "the proper balance between the national interest in stable bargaining relationships and finality of private settlement, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system." DelCostello, 103 S. Ct. at 2294 (quoting Mitchell, 451 U.S. at 70-71, 101 S. Ct. at 1568 (Steward, J., concurring in the judgment)).

In weighing these competing interests, the Third Circuit said:

> We believe that [this balance] is best struck if DelCostello is applied retroactively. Given the uncertainty that has characterized the borrowing of state statutes of limitations for Vaca-Hines actions, simple application of section 10(b)'s statute of limitations will serve to increase the uniformity of treatment among similar claims. More important, the imposition of the six-month limitations period will promote the finality of grievance-arbitration decisions and prevent the belated raising of claims after years have passed. Finally, the retrospective application of section 10(b) will not undermine the goal of providing adequate opportunity for the employee to vindicate his rights, for the Court has determined, in effect, that six months is long enough. We thus find that the second Chevron factor counsels in favor of retroactivity.

Perez v. Dana Corp., Parish Frame Division, 718 F.2d 581, at 588 (3d Cir. 1983).

We believe this reasoning to be sound, and likewise conclude that this

second criterion of Chevron favors DelCostello's retroactive application.

C. The Equities of Retroactive Application.

Finally, we must consider whether application of DelCostello to the Plaintiffs' suit would be inequitable. In Chevron, the Court noted the harshness of applying a statute of limitations retroactivety to deprive a plaintiff of any remedy whatsoever. 404 U.S. at 107-08, 92 S. Ct. at 355-56. In Chevron, however, the superseding legal doctrine "was quite unforeseeable." Id. at 108, 92 S. Ct. at 356. The change of law in that case occurred after a year of costly discovery; here, Plaintiffs' suit was successfully challenged at the outset as untimely. See Perez v. Dana Corp., Parish Frame Division, supra, at 588. Finally, despite the fact that dismissal of their

action will deprive the Plaintiffs of a remedy, we do not find that the Plaintiffs actually relied on established precedent in failing to safeguard their claims. As previously noted, no "clear past precedent" existed as to limitations on the section 301 claim. While Cox v. C. H. Masland & Sons, Inc., supra, and Sanderson v. Ford Motor Co., supra, may have established a tort statute of limitations as to the fair representation claim, the Plaintiffs did not cite or rely upon these authorities in their briefs.

III. CONCLUSION.

After examining the three Chevron factors, we conclude that, under the facts of this case, DelCostello should be applied retroactively to bar the Plaintiffs' claims. With reference to their section 301 claims, the Plaintiffs

have failed to establish that DelCostello overruled "clear past precedent" on which they may have relied. Aware as we are of the possibility that Plaintiffs may have relied on the two-year limitation for torts as being applicable to the fair representation claim, this circuit has not found that this factor to be most determinative as to whether a new rule of law shall be retroactively applied. We stated in Williams v. Phil Rich Fan Manufacturing Co., 552 F.2d 596, 600 (5th Cir. 1977), that "'in deciding whether civil rules should be applied retroactively we think that the purpose of the rule should be given greater weight than the extent to which the parties relied on the law that existed before that rule was announced.'" (quoting Matter of S/S Helena, 529 F.2d 744, 748 (5th Cir. 1976)).

As DelCostello makes clear, the law on the limitations question in section 301 wrongful discharge and unfair representation cases has been in a state of confusion for some time. This circuit and other circuits, prior to DelCostello, had adopted various state statutes of limitations, depending on the peculiarities of the limitations law of the state in question and the arguments of counsel in the particular case. We do not believe that DelCostello represents the kind of "clean break" with past precedent contemplated in Chevron. DelCostello was merely a "clarification," an attempt to impose a single policy and a single rule in a legally chaotic situation. DelCostello was intended to resolve widespread confusion and conflict in the circuits concerning the applicable statute of limitations in these cases. We do not

believe that a "clean break" results every time the Supreme Court clarifies the law by resolving an issue on which there is circuit conflict and confusion. See Lawson v. Truck Drivers, Chauffeurs & Helpers, 698 F.2d 250, 254 (6th Cir. 1983). "To so hold would reverse the regular common law rule, applied in Chevron...that we should not normally have one law for old cases and another law for new cases." Id.

Finally, we note that other circuits have concluded that the DelCostello rule applies retroactively. See Perez v. Dana Corp., Parish Frame Division, supra; Hand v. International Chemical Workers Union, 712 F.2d 1350 (11th Cir. 1983); Storck v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 600, 712 F.2d 1194 (7th Cir. 1983); Curtis v. Interna-

tional Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 299, 716 F.2d 360 (6th Cir. 1983).

The judgment of the district court is AFFIRMED.

George C. ROGERS, Plaintiff-Appellee,

v.

LOCKHEED-GEORGIA COMPANY and the Aeronautical Machinists Local Lodge 708, the International Association of Machinists and Aerospace Workers,

Defendants-Appellants.

Nos. 81-7810, 82-8137, 82-3005, 82-5625, 82-5115, 82-5194, 82-5313 and 82-5589.

United States Court of Appeals, Eleventh Circuit.

Dec. 5, 1983.

Appeals from the United States District Court for the Northern District of Georgia.

Appeals from the United States District Court for the Middle District of Florida.

Appeals from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, FAY and CLARK, Circuit Judges.

GODBOLD, Chief Judge:

These six consolidated cases were stayed pending this court's en banc

consideration of Hand v. International Chemical Workers Union, No. 81-5828. Hand and the present cases involve the applicable statute of limitations for an action that combines a breach of contract claim against an employer with a breach of duty of fair representation claim against a labor union. After this court granted en banc consideration to Hand, 681 F.2d 1308, the Supreme Court granted certiorari in two cases presenting the same issue, see DelCostello v. International Brotherhood of Teamsters and United Steelworkers of America v. Flowers, ____ U.S. ____, 103 S.Ct. 442, 74 L.Ed.2d 599 (1982), and en banc consideration was withheld pending decision in DelCostello. The Court decided DelCostello June 8, 1983, see ____ U.S. ____, 103S S.Ct. 2281, 76 L.Ed.2d 476 (1983), and the en banc court

then remanded Hand to the panel for consideration in light of DelCostello. See 712 F.2d 456 (11th Cir. 1983). On August 8, 1983, the panel issued its decision in Hand. See 712 F.2d 1350 (11th Cir. 1983).

In DelCostello the Supreme Court held that the six-month statute of limitations under section 10(b) of the National Labor Relations Act, 29, U.S.C. Sec. 160(b) (1975), governed a hybrid breach of contract/duty of fair representation claim. Each of the hybrid actions in these six cases was filed outside the six-month limitations period. The only remaining issue is whether the six-month period of DelCostello will be applied retroactively to these cases. We have considered supplemental briefs from the parties on this issue. We hold that DelCostello does apply.

I. Retroactivety

It is a "general rule of long standing . . . that judicial precedents normally have retroactive as well as prospective effect." National Association of Broadcasters v. FCC, 554 F.2d 1118, 1130 (D.C. Cir. 1976). The Supreme Court in DelCostello applied its decision retroactively to the parties before the Court. Plaintiff Flowers, in the companion case to DelCostello, filed suit in 1979 on a cause of action that had accrued 10 months earlier. The court of appeals found his action timely under a state three-year statute. The Supreme Court held, however, that section 10(b)'s six- month statute of limitations applied and that Flowers' action was, therefore, barred. Thus the Court retroactively applied its decision to a cause of action accruing several years earlier.

The test for nonretroactive application of a decision found in Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), further supports our conclusion. In Chevron the Supreme Court held that retroactive application is inappropriate only where (1) the new rule overrules clear past precedent or decides an issue of first impression whose resolution was not foreshadowed; (2) retroactive application will retard rather than further operation of the rule; and (3) retroactive application will produce substantial inequitable results. Id. at 106-07, 92 S.Ct at 355-56.

Assuming without deciding that DelCostello overruled past precedent, we believe that denying retroactive application would retard rather than further the operation of the rule. In

DelCostello the Court indicated the necessity of selecting a limitations period long enough to permit employees to vindicate their rights yet short enough not to prevent "the relatively rapid final resolution of labor disputes favored by federal law." ____ U.S. ____ at ____, 103 S.Ct. at 2292, 76 L.Ed.2d at 491. Section 10(b) embodied such a balance:

> In Sec. 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system. That is precisely the balance at issue in this case. The employee's interest in setting aside the 'final and binding' determination of a grievance through the method established by the collective-bargaining agreement unquestionably implicates 'those consensual processes that federal labor law is chiefly designed to promote--the formation of the . . . agreement and the private

> settlement of disputes under it.' [Auto Workers v.] Hossier [Corp.], 383 U.S. [696] at 702 [86 S.Ct. 1107 at 1111, 16 L.Ed.2d 192 (1966)]. Accordingly, '[t]he need for uniformity' among procedures followed for similar claims, ibid., as well as the clear congressional indication of the proper balance between the interest at stake, counsels, the adoption of Sec 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this.' [United Parcel Service, Inc. v. Mitchell] 451 U.S. [56] at 70-71 [101 S.Ct. 1559 at 1567-68, 67 L.Ed.2d 732].

Id. ____ U.S. at ____, 103 S.Ct. at 2294, 76 L.Ed.2d at 493 (quoting United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 70-71, 101 S.Ct. 1559, 1567-68, 67 L.Ed.2d 732 (1981) (Stewart, J., concurring)).

Plaintiffs urge the application of inconsistent state statutes of limitations with periods much longer than the six-months adopted in DelCostello. To apply those state statutes and deny retroactive application to DelCostello would retard rather than further the

federal interests in prompt resolution of labor disputes, finality, and consistency embodied in DelCostello.

Prospective application of DelCostello would cause inequitable results. Numerous state statutes of limitations would apply to essentially similar federal causes of action. Prospective application would extend the inconsistent results that DelCostello sought to remedy.

We hold that DelCostello applies to these cases. Our conclusion is buttressed by two recent decisions of this court. Both the panel decision in Hand after remand from the en banc court, see 712 F.2d 1350 (11th Cir. 1983), and Benson v. General Motors Corp., 716 F.2d 862 (11th Cir. 1983), applied DelCostello retroactively, although neither case specifically discussed the retroactivity

issue. See also Ernst v. Indiana Bell Telephone Co., 717 F.2d 1036 (7th Cir. 1983) (applying DelCostello retroactively with no discussion of retroactivity).

II. Disposition of these cases

A. No. 81-7810

Grievance filed March 1979 and returned unprocessed by employer approximately one month later. Union failed to indicate any determination by it on the grievance, which the district court found was breach of duty of fair representation. Plaintiff sued March 1980, approximately 11 months after union breach. There is no merit to plaintiff's argument that a remand is necessary to establish when the right of action accrued. District court denied defendants' motion for summary judgment raising timeliness. Judgment for plaintiff REVERSED.

B. No. 82-30U5

Union completed processing of the grievance and decided not to present it to an arbitrator in September 1980. Plaintiff sued August 1981. Action held time barred under Florida statute 541 F.Supp. 621. Since six months had expired, AFFIRMED.

C. No. 82-5625

Grievance denied October 1979; suit filed May 1981. Summary judgment for defendants, 538 F.Supp. 725, AFFIRMED.

D. No. 82-5115

Grievance filed June 1980, union withdrew it, and plaintiff learned of withdrawal October 1980. Suit Filed May 1981. Defendants' motion to dismiss denied and interlocutory appeal granted under 28 U.S.C. Sec. 1292(b). Order denying dismissal is REVERSED.

E. Nos. 82-5194, 82-5313, and 82-5589

Grievance denied May 1979, suit filed June 1980. Judgment for defendants AFFIRMED.

F. No. 82-8137

Dispute submitted to arbitration. Arbiter's award in favor of employer in May 1980. Suit filed April 1981. Count I asserted a hybrid breach of contract/ breach of duty claim. Summary judgment granted for defendants on this count, and defendant union and defendants Slad, Meers, and Turner dismissed from Count II. Final judgment granted as to union, Meers and Turner. Summary judgment for defendants AFFIRMED.